IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WAYNE CHARLES HOOD, Appellant.	No. 32495-4-II UNPUBLISHED OPINION

HOUGHTON, J. -- Wayne Hood appeals his conviction of two counts of assault with sexual motivation, one count of first degree rape, and one count of first degree attempted kidnapping. He argues that the trial court erred in denying his motion to sever, in admitting evidence, and in imposing an exceptional sentence. He also raises additional arguments in his Statement of Additional Grounds. We affirm.

FACTS

On May 27, 2003, around 8:00 p.m., G.H. left her Gig Harbor home to walk her dog. During the walk, she saw a man wearing an orange T-shirt and a baseball cap walking alone in the opposite direction on the other side of the street. She saw no one else on the street. She became concerned because the man held his shorts in front of him as if he was not wearing anything below his waist. She walked past him without looking back but then heard a scuffle of feet behind her.

The man suddenly appeared at her left shoulder. Still holding his shorts with his right hand, he threw his left arm around her chest and groped her crotch.

In response, G.H. jumped back yelling and started running away. When she looked back, the man turned and began to come toward her. Because she did not have her cellular telephone, she took her hand out of her sweatshirt pocket and pretended to have a cellular telephone as she mimicked making a call in order to scare her attacker away. The man stopped, turned around, and ran away in the opposite direction. Moments later, she heard the sounds of a car speeding away.

G.H. jogged home and reported the incident to the Gig Harbor police the next morning. She gave the police the man's description and described his clothing, the baseball cap, and the possible presence of beard stubble. In July 2003, G.H. saw television and print media news containing a photograph of a man arrested for a sexual attack. She recognized him as the man who had assaulted her. She called the police information number broadcast on the news and talked with Detective Ed Troyer. During trial, she identified Hood as her attacker.

On June 5, 2003, between 6:00 and 6:30 p.m., N.N. drove to a paved bike/walking path in Gig Harbor near where she lived. Her five-year-old daughter accompanied her, riding her bike. After walking along the path, as N.N. and her daughter returned to their car, they saw a man who appeared to be urinating in the bushes. N.N. and her daughter waited for a couple of minutes because they would have to pass directly by the man.

As N.N. and her daughter began moving again, the man walked toward them. As he drew closer, N.N. noticed that he wore nothing below his waist and that he held his shorts in front of him. The man charged into N.N., knocking her to the ground. N.N. pushed her daughter out of

the way causing her to fall over her bike. The man stood over N.N. and masturbated.

Lying on her back, N.N. tried to kick him while both N.N. and her daughter screamed. After looking around, the man stopped and ran toward the parking lot without his shorts on. N.N. immediately called 911 while trying to follow him to see if he entered a car. She provided a description of the man to the police. During trial, she identified Hood as her attacker.

On June 10, 2003, a little after 7:00 p.m., as C.P. jogged on the Wilson High School track in North Tacoma, she observed a middle-aged white male wearing a baseball cap, an orange T-shirt, and shorts standing in the infield. After finishing two laps, C.P. slowed to a walk. By this time, C.P. and the man were the only two people in the field. She heard someone running behind her and, assuming it was the man starting to jog, she moved out of the way.

Instead of passing her, the man grabbed C.P.'s left arm and buttocks from behind and put his hand underneath her running shorts. C.P. struggled to break free, swearing and yelling at the man to get away from her. She separated herself from him and he ran away, but he looked back and made a V sign with his fingers and wiggled his tongue in between.

C.P. returned home and called 911. Within a month, C.P. saw pictures of sex offenders in the Tacoma News Tribune and recognized one of them as the man who had attacked her. She called the number underneath the picture and talked with a police detective over the phone. During trial, C.P. identified Hood as her attacker.

On June 19, 2003, around midnight, as 15-year-old C.J. was walking home from her boyfriend's North Tacoma home, she saw a man who looked like a jogger wearing shorts coming toward her. When they were about 10 feet apart, the man ran toward her, picked her up in a bear hug, and threw her down to the ground.

C.J. screamed and struggled, pounding the man with her fist and trying to burn him with a cigarette. The man began choking her and told her that he would slit her throat if she kept screaming. He also told her that he knew where she lived and threatened to kill her if she made any loud noises. Pinning her down with one hand, the man then pulled down her pants and performed oral sex on her. He unsuccessfully tried to force her to give him oral sex. The man eventually stopped his attack and left.

Later, C.J. met with Detective Gene Miller and a sketch artist to give a description of the attacker. On July 12, C.J. identified Hood as the attacker after viewing photographs. During trial, she also identified Hood as her attacker.

On July 12, after spending the night at S.W.'s house in University Place, S.W. and T.W. decided to go jogging around 5:00 a.m. at the Curtis Junior High School track. As 13-year-olds S.W. and T.W. walked, they noticed a man behind them who appeared to be wearing only underwear. The man was about 20 feet away when T.W. first noticed him. He quickly approached the girls and said, "Good morning, how are you ladies?" when he came right next to S.W. 5 Report of Proceedings (RP) at 736. S.W. and T.W. replied, "Good." 5 RP at 736.

The man suddenly turned toward S.W. and grabbed her by sticking one of his arms between her legs and another arm over her shoulder in an attempt to throw her over his shoulder. While screaming for help, S.W. tossed her cell phone to T.W. and T.W. called 911. The man immediately dropped S.W. on the ground and ran. S.W. and T.W. reported the attack to 911. Both of them identified the man as Hood from a photograph and later during trial.

On July 14, 2003, the State charged Hood with one count of second degree assault, one count of first degree rape, and one count of first degree attempted kidnapping. On January 15,

2004, the State filed an amended information charging Hood with three counts of indecent exposure, two counts of second degree assault, one count of first degree rape, and one count of first degree attempted kidnapping. The State added sexual motivation to the two second degree assault charges.

Hood moved to sever the counts under CrR 4.4(b). The trial court denied his motion, ruling that "joinder was proper." RP (Feb. 6, 2004) at 39. It also denied his motion for reconsideration.

The court held a CrR 3.5 hearing regarding the admissibility of Hood's statements to the police.[1] It ruled that the statements were admissible. The next day, the court disqualified defense counsel because of his conflict of interest with one of the State's witnesses. Thereafter, while represented by a new counsel, Hood renewed his motion to sever, which the court again denied. Hood then pleaded guilty to three counts of indecent exposure (counts I-III).

The State sought to admit the testimony of G.H., one of the indecent exposure victims. Following an ER 404(b) hearing and over Hood's objection, the court found G.H.'s testimony admissible as evidence of a common scheme or plan and identity, but not admissible as evidence of intent. The court ruled that "all of these events involve an unknown male contacting females at isolated times and isolated locations and having some form of physical contact with them with a sudden move towards them, direct touching or groping." 3 RP at 389. The court concluded that "the distinct similarities . . . would give rise to a finding of a common scheme or plan." 3 RP at 389-90. The evidence was presented to the jury during trial.

[1] After being arrested, Hood signed a written statement admitting the incidents with C.J., N.N., and S.W. but describing them in a markedly different and less culpable way.

At the close of the State's case, Hood moved to dismiss the rape and kidnapping charges and renewed his motion to sever. The court denied all motions. In denying the renewed severance motion, the court ruled that "there is a substantial cross-admissibility on the questions of identity, common scheme or plan and intent." 7 RP at 1052.

At the close of his case, Hood again moved to dismiss the charges of rape, kidnapping, and assault against N.N. and renewed his motion to sever. The court denied his motions.

The jury returned a verdict of guilty on all counts and found that Hood committed both counts of second degree assault with a sexual motivation. The court imposed an exceptional sentence on all counts by ordering him to serve the high end of the standard ranges of each count consecutively.[2] His total sentence for his assault, rape, and attempted kidnapping convictions was 407 months to life. Hood now appeals.

ANALYSIS

Motion to sever

Hood first contends that the trial court erred in denying his motions to sever. He asserts that the charges were improperly joined under CrR 4.3, which provides:

> Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both . . . [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

[2] RCW 9.94A.589 requires serious violent offenses to run consecutively. Serious violent offenses include first degree attempted kidnapping and first degree rape. Former RCW 9.94A.030(37) (2003). Our Supreme Court recently held that a trial court may constitutionally impose consecutive sentences that may increase the aggregate term of imprisonment under RCW 9.94A.589 as long as the sentence for any single offense does not exceed the statutory maximum for that offense. *State v. Cubias*, 155 Wn.2d 549, 554, 120 P.3d 929 (2005). The court, however, did not explain whether its holding may extend to offenses not covered in RCW 9.94A.589.

Courts construe this rule expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), *rev'd in part*

on other grounds, 99 Wn.2d 538, 663 P.2d 476 (1983). We review the joinder of offenses de novo as a question of law. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111 (1992); *Hentz*, 32 Wn. App. at 189.

Convictions based on improper joinder must be reversed unless the error is harmless. *State v. Wilson*, 71 Wn. App. 880, 885, 863 P.2d 116 (1993), *rev'd in part on other grounds*, 125 Wn.2d 212, 883 P.2d 320 (1994). Nevertheless, where joinder is proper, the trial court still may sever the offenses where doing so will promote a fair determination of the defendant's guilt or innocence of each offense, taking into account prejudice to the defendant. CrR 4.4; *State v. Weddel*, 29 Wn. App. 461, 464, 629 P.2d 912, *review denied*, 96 Wn.2d 1009 (1981). We review a trial court's refusal to sever for manifest abuse of discretion. *State v. Kalakosky*, 121 Wn.2d 525, 537-39, 852 P.2d 1064 (1993). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here, contrary to Hood's contentions, sufficient similarity among the four charges exists to justify joinder. In concluding that joinder was proper, the court found:

> 1. All counts are properly joined because all seven counts are of the same or similar character and are based upon a series of acts connected together or constituting parts of a single scheme or plan.
> 2. The defendant has failed to persuade the court that the danger of prejudice of the defendant at a trial of joined counts outweighs the concern for judicial economy.
> 3. Accepting the facts as set forth in the briefs of the parties, many of the charged crimes would be cross-admissible under ER 404(b) at separate trials. Specifically, all counts are relevant to prove a common scheme or plan; and all counts are relevant to prove the defendant's intent . . . . Because the counts are cross-admissible, judicial economy . . . demand[s] one trial. . . .
> 4. The prejudice to the defendant will be minimized with the standard jury instruction that the jury shall consider each count separately and its verdict on one count should not control the verdict on another count.

Clerk's Papers (CP) at 28-29.

At trial, the court noted that "all of these events involve an unknown male contacting females at isolated times and isolated locations and having some form of physical contact with them with a sudden move towards them, [including] direct touching or groping." 3 RP at 389. Further, all of the incidents involved the same general locality and occurred within a time span of a month and a half. Consequently, the trial court properly joined the charges.

Relying heavily on *State v. Ramirez*, 46 Wn. App. 223, 730 P.2d 98 (1986) and *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984), both of which held that it was an abuse of discretion not to sever counts alleging sexual offenses where the incidents were not related and the evidence was not cross-admissible, Hood also contends that the trial court abused its discretion in denying his motion to sever. His argument fails because, as the trial court correctly noted, the charged crimes have the same or similar character and thus would be cross-admissible at separate trials to prove common scheme or plan.[3]

In addition, the record shows that the trial court weighed all of the appropriate factors when considering Hood's motion to sever. The court properly considered whether Hood might become embarrassed or confounded in presenting separate defenses or if it allowed the jury to cumulate evidence to find guilt or infer a criminal disposition, resulting in prejudice. *State v. Watkins*, 53 Wn. App. 264, 268, 766 P.2d 484 (1989). Prejudice mitigating factors include whether the jury could separate the evidence, the strength of the State's evidence on each count,

[3] Even if the evidence was not cross-admissible, case law does not support Hood's argument because our Supreme Court held: "The fact that separate counts would not be cross admissible in separate proceedings does not necessarily represent a sufficient ground to sever as a matter of law." *Kalakosky*, 121 Wn.2d at 538.

the admissibility of the evidence for the various counts, the clarity of the defenses, whether the judge instructed the jury to decide each count separately, and the concern for judicial economy. *State v. Russell*, 125 Wn.2d 24, 63, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995); *Kalakosky*, 121 Wn.2d at 537.

Here, Hood generally asserts that the State's witnesses, who were victims of the charged crimes, created "a latent feeling of hostility."[4] Appellant's Br. at 19. He fails to carry his burden of demonstrating the trial court's manifest abuse of discretion.

The trial court found much of the evidence cross-admissible to prove common scheme or plan. It instructed the jurors that they must decide each count separately and that their verdict on one count should not control their verdict on any other count. Further, the State presented a strong case because different victims positively identified Hood as the attacker and Hood himself admitted his involvement in one of the assault charges, the rape charge, and the attempted kidnapping charge--three of the four charges. Also, Hood does not claim or present any evidence

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[4] The court conducted two CrR 4.4(b) hearings, during which it responded to Hood's various arguments. During the first hearing, the court pointed out: "[I]f you were supposed to focus solely on that court instruction having no bearing and that jurors meddle it all up in their mind, then in every case we would have to separate all of these different counts into separate trials and the whole policy behind judicial economy certainly weighs completely against that idea." RP (Feb. 06, 2004) at 39. In denying Hood's motion to reconsider during the second hearing, the court stated:

> Some of the things that were mentioned by [defense counsel] seemed to be things that might be proper subjects of cross examination, but don't lead me to the conclusion that it creates such a prejudice to the defendant that he needs to have that case severed from everything else. The fact that he may want to testify as to part of the case but not as to all of the case . . . [is] a factor to consider amongst all of the factors, but I didn't hear anything in here--I didn't hear what specifically it was that he was intending on testifying to that was going to be so important that couldn't be proved in some other way that would require him to give up his right to remain silent.

RP (Feb. 17, 2004) at 25-26.

that joinder of the offenses caused prejudice through hindering any of his defenses.

Finally, as the trial court explained, the interests of preserving judicial economy and minimizing victim impact weighed in favor of denying Hood's severance motion. The trial court did not err in joining the offenses nor did it abuse its discretion in denying Hood's motions to sever.

Admission of Testimony

Hood next contends that the trial court erred in admitting the testimony of G.H., one of the indecent exposure victims, for purposes of proving common scheme or plan and identity. Evidence of other crimes may be admitted to prove identity or common scheme or plan. ER 404(b). To admit evidence of other misconduct, the trial court must: (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). We review trial court rulings admitting evidence under ER 404(b) for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

Citing *Lough*, Hood first asserts that G.H.'s testimony was inadmissible to prove common scheme or plan because "[her] attack bears insufficient common features to suggest that her attack and the other charges 'are naturally to be explained as caused by a general plan.'" Appellant's Br. at 21. According to Hood, the similarities between the assault on G.H. and other charges are limited because they are "elements common to nearly all sexual assault or rape charges." Appellant's Br. at 21.

In *Lough*, our Supreme Court noted that the common scheme or plan exception to ER 404(b) arises "where several crimes constitute constituent parts of a plan in which each crime is

but a piece of the larger plan" or "when an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes." 125 Wn.2d at 855. The *Lough* court held that the results in the second category of cases will depend on the facts of each case. 125 Wn.2d at 856.

The State charged Lough with drugging the victim's drink and then raping her. *Lough*, 125 Wn.2d at 849. Four other women claimed that Lough had done the same thing to them two to ten years earlier. *Lough*, 125 Wn.2d at 850. Our Supreme Court affirmed the admission of the prior events to prove that the charged offense was part of a common scheme or plan. *Lough*, 125 Wn.2d at 864-65. The *Lough* court also noted that "'a single previous act, even upon another woman, may, with other circumstances, give strong indication of a design (not a disposition) to rape.'" 125 Wn.2d at 858-59 (emphasis omitted) (quoting 2 John H. Wigmore, Evidence § 357, at 335-42 (James H. Chadbourn rev. ed. 1979)).

When "the issue is whether the crime occurred, the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative. Therefore, prior bad acts may be admitted to show a plan or design if they satisfy the substantial threshold articulated in *Lough*." *State v. DeVincentis*, 150 Wn.2d 11, 17-18, 74 P.3d 119 (2003). "Although this burden is substantial, our holding focused on the *similarity* between the prior bad acts and the charged crime rather than the *uniqueness* of the individual acts." *DeVincentis*, 150 Wn.2d at 19.

Here, the trial court admitted G.H.'s testimony under the second category listed in *Lough*. And, as in *Lough*, the main issue at trial was the existence of the sex crimes because Hood, in admitting his involvement in three of the four charges, claimed that he "never raped anyone" and just wanted to "get aroused." 7 RP at 1002. Accordingly, uniqueness of the common features between the prior crimes and the current offense is not necessary. *DeVincentis*, 150 Wn.2d at 21.

The trial court was required to apply the *Lough* four-part test and to base its decision on tenable grounds and reasons. *DeVincentis*, 150 Wn.2d 23-24. The trial court did so here.

First, the trial court found by a preponderance of the evidence that the event described by G.H. did occur and issued a limiting instruction. Further, it explained why it was allowing the testimony for common scheme or plan and for identity but not for intent. The court analyzed the similarities between the offense against G.H. and other charges and made the following findings:

> I think what is clear in this case is that all of these events involve an unknown male contacting females at isolated times and isolated locations and having some form of physical contact with them with a sudden move towards them, direct touching or groping. That was consistent with [G.H.]; it was consistent with [C.P.], and it was consistent with the alleged victim in [the assault count]. The alleged rape victim, C.J., which is Count VI, also dealt with her, an isolated female, isolated location, and contact by a male suddenly occurring.

3 RP at 389. The court therefore concluded that "the distinct similarities . . . would give rise to a finding of a common scheme or plan." 3 RP at 389-90. As in *Lough* and *DeVincentis*, the similarities between the offense against G.H. and other offenses were substantial. Consequently, the court found G.H.'s testimony admissible under the common scheme or plan exception. It did not abuse its broad discretion in doing so.

The court also admitted G.H.'s testimony to prove identity. Evidence of other bad acts introduced to show identity is usually relevant only if the method employed in the commission of both crimes is unique in that proof that an accused committed one of the crimes creates a high probability that he also committed the other crime with which he is charged. *Thang*, 145 Wn.2d at 643. But "[e]ven when features are not individually unique, appearance of several features in the case to be compared, especially when combined with a lack of dissimilarities, can create sufficient inference that they are not coincidental, thereby justifying the trial court's finding of

relevancy." *Thang*, 145 Wn.2d at 644; *State v. Jenkins*, 53 Wn. App. 228, 237, 766 P.2d 499 (pipe wrench burglaries, brown Camaros, and ground floor entries are not unique, but when combined with the crimes' other similarities, they created similarities sufficient to admit as identity evidence)), *review denied*, 112 Wn.2d 1016 (1989). Factors relevant to determining the similarity between crimes include geographical proximity, commission of the crimes within a short time frame, and the defendant's clothing or appearance. *Thang*, 145 Wn.2d at 643.

In addition to the strikingly similar method Hood used in approaching the female victims, the general locality (North Tacoma and Gig Harbor), and the short time span (a month and one-half), there were other common features between the incident involving G.H. and the other attacks, including the attacker's clothing (orange T-shirt and shorts), baseball cap, and physical appearance. Combined, these factors are sufficient to support the court's finding of relevancy. Accordingly, the court did not abuse its discretion in admitting G.H.'s testimony to prove the identity of the attacker.

Finally, Hood contends that G.H.'s testimony was more prejudicial than probative. He quotes *State v. Newton*, 109 Wn.2d 69, 74 n.2, 743 P.2d 254 (1987), for the proposition that it was a "'naïve assumption that prejudicial effects can be overcome by instructions to the jury.'" (quoting *Krulewitch v. United States*, 336, U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949)). This argument fails because the court conducted the required balancing test of the probative value of G.H.'s testimony against the prejudice to Hood. After citing *Lough* and *DeVincentis*, the court concluded, "There certainly is prejudice attached to this kind of testimony, but I think factually, given this scenario, that this is evidence that the State should not be deprived of. And I think the prejudice can be minimized by an instruction." 3 RP at 390. The court conducted the required

balancing test on the record, and it did not abuse its discretion because it based its ruling on tenable grounds and reasons. Hood's contention fails.

Exceptional Sentence

Hood next assigns error under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004). He asserts that the trial court erred in imposing exceptional sentences on his two assault convictions. He raises two arguments. First, he argues that the court erred because it based the exceptional sentence on the jury's finding of sexual motivation when the legislature had already taken account of sexual motivation in computing the standard range sentence. Second, he argues that the trial court erred because *Hughes* requires the jury to find not only the existence of the aggravating factor (sexual motivation), but also that the aggravating factor (sexual motivation) warrants an exceptional sentence.

We review the imposition of an exceptional sentence under RCW 9.94A.210(4). *State v. Ferguson*, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001). RCW 9.94A.210(4) requires us to apply a three-prong test in determining the appropriateness of an exceptional sentence: (1) whether the record supports the sentencing court's reasons, (2) whether the reasons justify the exceptional sentence as a matter of law under de novo review, and (3) whether the sentence is clearly too excessive or too lenient under an abuse of discretion review. *Ferguson*, 142 Wn.2d at 646.

In determining whether the court's reasons justify an exceptional sentence, we employ a two-part analysis: first the trial court may not base an exceptional sentence on factors necessarily considered by the legislature in establishing the standard sentence range; and second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991).

With regard to his first argument, Hood assigns error only to the court's reliance on a

factor that he asserts the legislature considered in establishing the standard range. Here, the trial court based its exceptional sentence of the two assault convictions on the jury's sexual motivation finding.

In a second degree assault charge, a jury's finding of sexual motivation elevates the crime from a class B felony to a class A felony. RCW 9A.36.021(2). According to Hood, "this necessarily modifies the standard range sentence which is applicable to that crime . . . [and] this is a factor necessarily considered by the legislature in computing the standard range for the crime." Appellant's Br. at 26.

With an offender score of eight, the standard sentence range for each of Hood's second degree assault convictions was 53 to 70 months. Sentencing Guidelines Comm'n, Adult Sentencing Guidelines Manual III-60 (2002). But because of the jury's finding of sexual motivation, the standard range of 53 to 70 months became the minimum term and life sentence became the maximum term for the assault convictions. Sentencing Guidelines, at III-61; RCW 9A.20.021(1); CP at 176. Thus, Hood is correct that the legislature already considered the sexual motivation factor in establishing the standard sentence range for the crime of second degree assault with sexual motivation.

Nevertheless, Hood's exceptional minimum sentence is justified as a matter of law. Our Supreme Court recently held, "*Blakely* does not apply to exceptional minimum sentences imposed under RCW 9.94A.712 that do not exceed the maximum sentence imposed." *State v. Clarke*, 2006 Wash. LEXIS 425, *21 (Wash. May 11, 2006). It also noted:

> Because Clarke is serving an indeterminate life sentence under RCW 9.94A.712, the relevant "statutory maximum" that the sentencing court may impose without any additional findings is life imprisonment. The standard range for minimum sentences under RCW 9.94A.712 provides a guideline for when the ISRB should

> consider release, but the standard range does not in any way establish Clarke's maximum sentence. Because Clarke's sentence is indeterminate, his exceptional minimum sentence, although part of his punishment, is irrelevant under *Blakely* analysis because the relevant statutory maximum for *Apprendi* purposes is life imprisonment.

State v. Clarke, 2006 Wash. LEXIS at *14-*15 (footnote omitted).

Here, as in *Clarke*, Hood's relevant statutory maximum for *Apprendi* purposes is life imprisonment. That is, his exceptional minimum sentence (a consecutive sentence of 140 months) is irrelevant under *Blakely* analysis because it does not exceed the statutory maximum (life). Given that "the relevant 'statutory maximum' that the sentencing court may impose without any additional findings is life imprisonment," we cannot say that the exceptional minimum sentence here constituted a reversible error. *Clarke*, 2006 Wash. LEXIS at *14. Hood's *Blakely* argument fails.

With regard to his second argument regarding the exceptional sentence, Hood argues that *Hughes* requires the jury to find not only the existence of the aggravating factor (sexual motivation) but also the fact that the aggravating factor requires an exceptional sentence in this case. This argument lacks merit because *Hughes* noted, "*Blakely* left intact the trial judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence . . . . That decision is a legal judgment which, unlike factual determinations, can still be made by the trial court." 154 Wn.2d at 137.

Here, the sentencing court concluded:

> The court is not precluded from finding substantial and compelling reasons to impose a sentence in excess of the standard range for Counts IV and V in this case because the State provided the defense with notice of the alleged aggravating circumstance of sexual motivation in the Corrected Amended Information; and the fact that sexual motivation existed for Counts IV and V was proved and found by a jury beyond a reasonable doubt.[5]

CP at 177. Once the jury made the factual determination that sexual motivation existed, the court was allowed to determine that it constituted a substantial and compelling reason to impose an exceptional sentence. Accordingly, the court did not err under *Hughes*. Hood's sentencing arguments fail.

Statement of Additional Grounds for Review (SAG)[6]

In his SAG, Hood first contends that the trial court "relieved the [S]tate of proving that penetration occurred" because jury instruction 21 stated that "sexual intercourse means any act of sexual contact between persons involving the sex organs of one person and the mouth of another" and because the victim testified that penetration never happened. SAG at 6.

The record does not support Hood's contention because the court's instruction 37 stated that "sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight; . . . or any act of sexual contact between persons involving the sex organs of one person and the mouth of another." CP at 120. Hood's argument fails.

Hood next contends that the trial court erred in failing to give an instruction on the definition of "serious physical injury" in conjunction with the instruction on first degree rape. SAG at 8. According to Hood, the court should have given an instruction that "[s]erious physical injury means physical injury which involves a substantial risk of death, serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."

[5] Counts IV and V refer to the two second degree assault charges.

[6] RAP 10.10.

SAG at 8.

We review de novo the propriety of giving a proposed instruction on a question of law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). We review the proposed instructions in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, *vacated sub nom*. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001). But the law does not entitle a criminal defendant to an instruction that inaccurately states the law. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

The trial court did not err in refusing to give Hood's proposed instruction because it does not accurately state Washington law. No statute defines "serious physical injury." Although the legislature has defined "serious bodily injury" in other contexts,[7] it did not do so in the first degree rape statute. Our court ruled in dicta, which Division One adopted:

> In our view it is neither necessary nor desirable to attempt [a definition of "serious physical injury"] in a jury instruction. The term speaks for itself . . . . The jury is usually told it may rely upon common sense and the "common experience of mankind." Judges and lawyers are no better able to explain such ordinary terms than the jurors themselves.

State v. Welker, 37 Wn. App. 628, 638 n.2, 683 P.2d 1110, *review denied*, 102 Wn. 2d 1006 (1984); *State v. Taitt*, 93 Wn. App. 783, 791, 970 P.2d 785 (1999). The reasoning in *Welker* persuades us. Moreover, Washington courts presume that the legislature is aware of prior interpretations of its enactments. *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984). The legislative inaction after *Welker* and *Taitt* indicates approval of the courts' reasoning. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 789, 719 P.2d 531 (1986). Thus, the court's failure to define the term "serious physical injury" for the jury was

[7] *See* RCW 9A.04.110(4)(b)-(c); RCW 9A.42.010(2)(b)-(c); RCW 16.52.011(2)(j); RCW 46.61.522(3).

not an error.

Hood further contends that insufficient evidence supports his first degree kidnapping conviction. He argues that "[n]o step or evidence of abduction was proven" because "[k]idnapping must include that victim was moved a few feet or yards." SAG at 9.

Hood bases his argument on a misapprehension of the law. Because the State charged Hood with first degree attempted kidnapping, not first degree kidnapping, the State only had to prove that he took a substantial step toward committing the crime. A substantial step is something that indicates a criminal purpose and is more than mere preparation. Hood's conduct of following S.W. and grabbing her by her legs and shoulder in an attempt to throw her over his shoulder sufficiently supports his first degree attempted kidnapping conviction.

Hood next contends that the State failed to prove the intent element of his attempted kidnapping charge because it "relied solely on weak circumstantial evidence." SAG at 10. He points to a flaw in the testimony of a witness who saw him running through a yard. His argument fails because the neighbor's testimony was not the sole support for the State's attempted kidnapping charge and because the law makes no distinction between the weight given to either direct or circumstantial evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); 11 Washington Pattern Jury Instructions: Criminal 5.01 (2d ed. 1994). The State offered substantial evidence to support a finding of intent through S.W.'s and her friend T.W.'s testimony.

Hood further contends that the trial court erred in declining to order Detective Troyer to turn in all the tips from the Crime Stoppers program. Hood asserts that it violated his right to confront and cross-examine witnesses.

A trial court retains broad discretion regarding the admission or exclusion of evidence. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991). Further, we do not reverse a trial court's rulings on the scope of cross-examination absent a manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985).

Due process "requires disclosure only of evidence that is both favorable to the accused and 'material either to guilt or to punishment.'" *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). Evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. In applying this "reasonable probability" standard, the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (quoting *Bagley*, 473 U.S. at 678). Documents relating to a search the defendant cannot challenge are neither favorable to him nor material to guilt or punishment. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998).

Here, the Crime Stoppers had anonymous tips to the police force that initiated the investigation against Hood. That is, Hood became a suspect when the Crime Stoppers' tips flowed in after the police distributed a sketch of him based on N.N.'s description. After a motion

hearing, the trial court ruled, "I am not going to order that all of the tip information be produced. Crime Stoppers is not an entity that the State has control over and I don't think that that is necessarily exculpatory." 7 RP at 1010. The court then allowed Hood to cross-examine on a specific Crime Stopper tip regarding a dog bite incident even though the court did not find it to be necessarily exculpatory. Hood fails to show how any of the tips could have been material to his guilt or punishment and how there was a reasonable probability of a different result. Because Hood does not show how the tips could have been exculpatory, the exclusion did not undermine his right to a fair trial. The trial court did not abuse its discretion in declining to order Crime Stoppers to reveal its tips.

Hood also contends that the State, in closing argument, "commited [sic] prejudicial error by vouching for Detective Hall" regarding a testimony about dog bites. SAG at 13. A prosecutor may not personally vouch for a witness's credibility. *Brett*, 126 Wn.2d at 175. "Prosecutors may, however, argue an inference from the evidence, and prejudicial error will not be found unless it is 'clear and unmistakable' that counsel is expressing a personal opinion." *Brett*, 126 Wn.2d at 175 (quoting *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). Further, "prosecutorial misconduct justifies reversal of a criminal conviction only when there is a substantial likelihood that such misconduct affected the verdict." *State v. Brooks*, 20 Wn. App. 52, 67, 579 P.2d 961, *review denied*, 91 Wn.2d 1001 (1978).

At trial, Hood referred to scratches and bites he received from dogs during the course of his work as a garbage collector. He countered the prosecution's theory that he received these scrapes and bruises when he attacked the victims, especially the rape victim C.J., while wearing only shorts and asserted that the dog attacks were the actual cause of the injuries. But Hall

testified that he, as a police officer who had seen dog injuries before, did not believe that dog attacks caused Hood's injuries. And the prosecution commented in its closing that Hall, "a long time police officer[] [who has] seen dog bites," did not believe Hood's injuries were dog bites. RP at 1153.

Regardless of Hood's theory about the bruises, the prosecution's mere reference to Hall's testimony during closing does not even resemble a true prosecutorial misconduct. The prosecution's statements were based on the evidence and were not clear and unmistakable expressions of personal opinion. Accordingly, not only is it difficult to view the prosecutor's conduct as misconduct, but even if we were to assume this, it is impossible to see how it could have affected the verdict. The prosecution did not commit any prejudicial error by referring to Hall's testimony in its closing.

Finally, Hood contends that the State committed prejudicial error by commenting on his pretrial publicity. According to Hood, the prosecution said that the news reports on Hood's crimes caused "no woman in two major cities [to] go anywhere alone" and that Hood was a "predator hunting for women and girls." SAG at 14.

A defendant alleging prosecutorial misconduct must show both improper conduct and prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). To establish prejudice, the defendant must show a substantial likelihood that the misconduct affected the jury's verdict. *In re Pers. Restraint Pirtle*, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). In determining whether a prosecutor's remarks require a new trial, we view them in the context of the total argument, the issues in the case, the evidence addressed in argument, and the court's instructions to the jury. *Russell*, 125 Wn.2d at 85-86. A defendant

who does not object at trial waives the argument unless the misconduct was so "flagrant and ill-intentioned that it evinces an enduring and resulting prejudice." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

Hood did not object at trial. If he had, the court could have recited that the jury must base its decision on the evidence presented and cannot permit prejudice to influence its verdict. And these remarks were not so flagrant and ill-intentioned as to evince an enduring prejudice. Further, the law presumes that a jury will follow the court's instructions. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990). The trial court instructed: "The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP at 82. Hood offers no proof that the jury failed to do so. Given this presumption, combined with his failure to object below or show prejudice, his prosecutorial misconduct argument fails.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

_____
Houghton, J.

We concur:

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Quinn-Brintnall, C.J.

_____
Van Deren, J.